IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.545 OF 2003

Prabhudas Lilladhar Pvt.Ltd. ... Petitioners

v/s

Shivam Multimedia Services Pvt.Ltd. and others ... Respondents

Mr Vicky Singh with Ms Ameesha Manuborwala i/b M/s M. and M. Legal Venture for Petitioners.

Mr S.R. Kumbhat i/b Mr K.K. Tated for Respondent No.2.

CORAM : D.K.DESHMUKH J.

DATE : 2ND MAY 2005

P.C.: -

1. By this petition, the petitioners challenge only that part of the award made by the learned Arbitrators whereby the learned Arbitrators have held that the respondent Nos.2 to 5 are not liable. An award has been made against the respondent No.1 - Private Limited Company. The respondent No.1 Private Limited Company, against which award has been made, has not challenged the award and has accepted the award. Therefore, the only question to be considered is were the Arbitrators justified in holding that the respondent Nos.2 to 5 are not jointly and severally liable alongwith the respondent No.1 for the amounts for which award has been made because though the respondent Nos.2 to 5 are shareholders of the respondent No.1 Company, they are also its Directors. In order to appreciate the case of the petitioners, if one refers to the statement of claim, it reveals that in paragraphs 18 and 19, the case of the petitioners was that the respondent No.1 Company was nothing but a glorified partnership of respondent Nos.2 and 3, which is run by respondent Nos.2, 3 and 5 and therefore, they are jointly and severally liable for outstanding dues. It was also claimed that the respondent Nos.2 and 3 have created the

respondent No.1 Company only to avoid their personal liability. In short, the case of the petitioners was that the corporate entity for respondent No.1 is being misused by respondent Nos.2, 3 and 5 to avoid their personal liability. Paragraphs 18 and 19 of the statement of claim read as under :-

> "18. The Applicant submits that the Respondent No.1 Company being a glorified (quasi) partnership of Respondent Nos.2 and 3 and in view of the fact that the Respondent No.1 Company being managed and run by Respondent Nos.2, 3 and 5, all the Respondents are jointly and severally liable for their outstanding dues to the Applicant. The Applicant submits that the Respondent No.1 Company is a device of the Respondents to avoid their liability by incorporating a Company with limited liability. The Respondent Nos.2 and 3 have committed fraud which is demonstrated from what is stated hereinabove and are now seeking to avoid their liability. The Respondents are doing their personal business through such limited liability, entities in order to avoid repayment of personal losses.

19. The Applicant further states and submits that the Respondent No.1 Company is more than merely judicial entity and in fact beyond it there are individuals namely Respondent Nos.2 and 3 who have incorporated the same control and manage it with a view to avoid their personal liabilities. The Respondent No.1 Company is incorporated solely for fraudulently conducting the business of the Respondent Nos.2 and 3 and thus avoid liability under the garb of limited Company. The applicant entered into the said transaction for and on behalf of the Respondent No.1 Company in terms of the instructions received from the Respondent No.2. As such all the Respondents are jointly and severally liable to pay the applicant, amount as more particularly set out in the particulars of claim hereto. The applicant craves leave to refer to and rely upon various judicial pronouncement by the Apex Court as well as High Courts wherein the Courts have lifted the Corporate veil and have held the directors / shareholders personally liable for

the liabilities of the Company."

. The respondent Nos.2 and 5 filed their reply.

The reply to paragraph 18 is contained in paragraph 21 of the reply which reads as under :-

> "21. Re: Para 18 :- The contents of this para are denied in toto. They are mere repetition of what has been already averred by the applicant and denied by the Respondents. It is denied that the respondent Nos.2 and 3 committed fraud. The fact is that the applicant is the real originator and perpetrator of the fraud and the respondents have been made the scapegoat. The men may lie, but the circumstances never lie, and in this case the circumstances mentioned above fully demonstrate and loudly proclaim the fraud committed by the applicant in conspiracy with Mr Johari / Century Consultants. The aforesaid fully established circumstances lead to an irresistible conclusion that the Applicant and A.M. Johari of the Century Consultants did conspire to carry out illegal trade in the scrip of Cyber Space Ltd. and did carry out the illegal trade and involved the Respondent No.1 therein for routing the illegal trade, through the Respondent No.1."

. Perusal of the reply by the respondents quoted

above shows that they have not given any details which were within their special knowledge as to the shareholding of the respondent No.1 Company. They have not disclosed material to show that the respondent No.1 is not a glorified partnership. In short, except for barely denying averments in paragraphs 18 and 19, the respondents have not disclosed information regarding the formation, shareholding and administration of the respondent No.1 Company which was within their knowledge and therefore, they were under a duty to disclose that before the Arbitrators. It is further to be seen here that the petitioners in paragraph 13 had in terms referred to a statement of respondent No.2 which was recorded in the enquiry before the SEBI. Paragraph 13 of the statement of claim reads as under :-

> "13. The Respondent No.2 in a statement given by him on oath to SEBI has inter alia, admitted that he had carried on the trades in the script of Cyberspace for and on behalf of Mr Johri and/or Century Consultants. A copy of the said statement is annexed hereto and marked as Exh.'U'. Based on the statement given by the Respondent No.2 to NSE, NSE came to the conclusion that the trades of the applicant on behalf of the Respondents were vitiated by fraud. Relevant portion of NSE

Investigation Report from its page No.23 of the Report in Exh.Q is reproduced below. The Applicant submits that the Respondents have defrauded and / or cheated the Applicant by acting in collusion with Century Consultants and / or Mr Johri.

'He has further stated, in answer to question No.10 that he has dealt with the shares of Cyberspace on the request of Shri Johari of Century Consultants Ltd. To that extent, there appears to be no contradiction and we see no reason to reject his own admission about his association with Century Consultants and Shri Johari, and that he traded for them.'"

. Reply to paragraph 13 is contained in paragraph 16 of the reply filed by the respondents which reads as under :-

"16. Re : Para 13 :- The contents of this para which are mattes of record has to be proved by producing the concerned documents. It is denied that the Respondents defrauded and / or cheated the applicant by acting in collusion with the Century Consultants and or

Mr Johari. Those averments are nothing but Devil quoting the Bible. In fact the respondent No.1 is the victim of mechanisms and fraud practiced by the Applicant and Mr Johari / Century Consultants. As stated earlier the applicant being in pari delicto and as fraud has been carried out, the applicant is not entitled to claim refund from the respondents."

. Perusal of the reply shows that the respondent No.2 did not deny that he made the statement on which reliance was placed by the petitioners. Perusal of the relevant part of the statement on oath made by the respondent No.2 before the SEBI shows that in answer to para 1, the respondent No.2 states that :-

"Q.1 : Please identify yourself.

Ans.: I am shri Rajendra Mehta, one of the Directors of Rosewood Tradelinks Pvt.Ltd., Pradeepak Finance and Management Consultants Pvt. Ltd. and Shivam Multi Services Pvt.Ltd. The other director is Sri Harshad Shah. These three companies are group / associate companies. My residential address is A-36, Roop Darshan, Juhu Lane, New India Colony,

Andheri (West), Mumbai 58, Tel. 671 8690. Addresses of all the above companies are same and the address is 206 A, Trade Corner, Saki Naka, Andheri (East), Mumbai 72, Tel. 852 8527.

Q.5 : Have you traded in the scrip of Cyberspace Infosys Ltd. and from when ?

Ans.: We have traded in the scrip of Cyberspace Infosys Ltd. since July 2000 through out three companies.

Q.15 : It is understood from your statement that the purchase and sale of shares of Cyberspace Ltd. by your companies were done on behest of Shri Arvind Johari. Why you had allowed him to use your companies for their benefits ?

Ans.: Shri Arvind Johari has shown very rosy picture about Cyberspace and its future projects. It was my foolishness to allow him to do such transactions in which I was only the looser and victim of his ultimate motives.

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. It is thus clear from these statements that

the respondent No.2 admitted that the respondent No.1 was his Company and he also accepted his dealings in the shares at the instance of Mr Johari. Now this statement was specifically referred to in the statement of claim. It was not denied by the respondents. Therefore, the Arbitral Tribunal was under a duty to consider this statement. Perusal of the award however shows that the Arbitral Tribunal has not considered this statement at all. This clearly shows non-application of mind on the part of the Arbitral Tribunal to the relevant aspect of the fact. Perusal of the award of the Arbitral Tribunal shows that they have declined to make an award against the respondent Nos.2 to 5 also for the sole reason that the respondent No.1 is a corporate entity and the dealings were between the petitioners and the respondent No.1. In my opinion, the Arbitral Tribunal was not justified in declining to examine the case put up by the petitioners that the respondent No.1 was only a glorified partnership of which the respondent Nos.2 to 5 were shareholders and Directors, they were using the corporate entity of the respondent No.1 to deny their liability. In my opinion, the Arbitral Tribunal had the jurisdiction to examine the case put up by the petitioners whether the respondent No.1 though incorporated as a Private Limited Company, was in truth and substance, a glorified partnership and the respondent Nos.2 to 5 were misusing the corporate entity

of the respondent No.1 to deny their liability. So far as the material available on record is concerned, it clearly indicates that the petitioners had made out their case that not only the respondent No.1 was liable but the respondent Nos.2 to 5 were also liable jointly and severally. In the result, therefore, the present petition succeeds and is allowed. The award impugned in the petition is modified. It is held that by the award, the respondent Nos.1 to 5 are directed to pay to the petitioners an amount of Rs.3,72,78,897/- with interest calculated on the amount at the rate of 15 % p.a. from 1st December 2002 upto the date of payment. Petition is disposed off. Respondent Nos.2 to 5 shall pay costs of the petition to the petitioners as incurred by the petitioners.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary as true copy.

. Certified copy expedited.